87-810

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

No. _____

JAIME FLOREZ,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO REVERSE THE TRIAL COURT'S ORDER DENYING THE PETITIONER'S MOTION TO DISMISS FIRST SUPERSEDING INDICTMENT WHICH ASSERTED THAT STRUCTURING OF CASH DEPOSITS BY A BANK CUSTOMER DID NOT CREATE A PROSECUTABLE OFFENSE UNDER 18 U.S.C. SECTIONS 1001 AND 2 (b).

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I. Whether the Court of Appeals erred in failing to reverse the trial court's order denying the Petitioner's Motion to dismiss First Superseding Indictment which asserted that structuring of cash deposits by a bank customer did not create a prosecutable offense under 18 U.S.C. Sections 1001 and 2 (b).

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OPINION BELOW

The Opinion of the Circuit Court of Appeals for the Eleventh Circuit will not be officially reported. A copy of the Court's Opinion appears in the Appendix herein (A-1).

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit was entered on September 16, 1987, affirming the Petitioner's conviction herein. This Petition is filed within sixty days of that decision and is timely filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1) and Supreme Court Rules 21 and 17 (a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The fundamental right to due process of law is implicit in the Fifth Amendment to the United States Constitution. Also involved in this case is the interpretation of 18 U.S.C. Sections 1001 and 2(b) and 31 U.S.C. Section 5313. (See Appendix B).

STATEMENT OF THE CASE AND FACTS

i. *Course of Proceedings and Disposition in the Trial Court:*

Superseding Indictment S86-293-Cr-T-15 (A) was filed on July 24, 1986, in the United States District Court for the Middle District of Florida, Tampa Division, in twelve counts (R1-33). *Count One* charged a conspiracy among the Petitioner, Dr. Jaime Florez, and unidentified co-conspirators, beginning on an unknown date until on or about April 30, 1986, to (1) intentionally defraud the Internal Revenue Service (I.R.S.) by impairing, obstructing and defeating the I.R.S.'s function of the collection of data and reports of currency transactions in excess of $10,000.00 and of the enforcement of the laws and regulations found in Title 31 of the United States Code and Title 31 of the Code of Federal Regulations concerning the reporting of currency transactions in excess of $10,000.00; and (2) to conceal material facts from the I.R.S. *Counts Two through Twelve* charged that Dr. Florez engaged in a scheme to conceal material facts from the I.R.S. by engaging in a scheme to bypass the bank filing currency transaction reports required by Title 31, U.S.C. §5313, in violation of Title 18 United States Code §§1001 and 2(b).

Counts Two through Twelve alleged that Dr. Florez: (1) made same day deposits of currency to banking accounts he controlled at the same bank (Counts Three and Seven); (2) made same day deposits of currency to banking accounts he controlled at different branches of the same bank (Counts Two, Four, Five, Six, Eleven and Twelve); (3) made same day purchases of cashier's checks with currency from different branches of the same bank (Count Eight); and (4) made same day deposits of currency to banking accounts at different branches of the same bank, including the same day purchase of cashier's checks with currency at a branch of the same bank

(Counts Nine and Ten)[1]/ Each of these same day deposits or cashier's check purchases were in increments of less than $10,000.00, United States Currency, and the total of the deposits and/or cashier's check purchases made by Dr. Florez at the same bank or at different branches of the same bank on the same day were in excess of $10,000.00.

On July 29, 1986, Petitioner filed a Motion to Dismiss First Superceding Indictment (R1-39). The Government filed a Memorandum of Law in opposition to Dr. Florez's Motion on August 7, 1986 (R1-45). The trial Court entered an Order on September 5, 1986, denying Petitioner's Motion (R1-52).

A jury trial commenced on October 14, 1986, (R2-58) (R2-59), however, a plea agreement was filed with, and accepted by, the trial court on October 16, 1986 (R2-62). Pursuant to the Plea Agreement, Dr. Florez entered conditional pleas of guilty to Counts 3, 4, 8, 10 and 12 of the First Superseding Indictment, pursuant to Rule 11 (a) (2), Federal Rule of Criminal Procedure (R2-63) (R5-77). The remaining counts were to be dismissed at sentencing [2]/

Thereafter, Dr. Florez was sentenced on January 6, 1987, to two, consecutive five year prison sentences on Counts 3 and 4 as well as $10,000.00 committed fines on each of those counts. On Counts 8 and 10 Petitioner was sentenced to two, five-year prison sentences to run concurrently with those sentences imposed on Counts 3 and 4. Additionally, on Count 12 imposition of sentence was suspended and Dr. Florez was sentenced to five years probation to run consecutive to the sentence imposed on Count 4 (R4-69) (R6-75A). The remaining counts were dismissed.

On January 6, 1987, Dr. Florez filed a timely Notice of Appeal of his conviction with the United States Court of Appeals for the Eleventh Circuit (R4-72). Jurisdiction

[1]/ On October 16, 1986, Petitioner entered conditional guilty pleas to Counts 3, 4, 8, 10 and 12. These counts encompass each of the activities set forth above.

[2]/ The remaining substantive counts in which CTR's were filed by the banks, were dismissed at sentencing upon Government's Motion.

was invoked pursuant to 28 U.S.C. Section 1291.

On September 16, 1987, the United States Court of Appeals for the Eleventh Circuit affirmed Dr. Florez's conviction (See Appendix A).

ii *STATEMENT OF THE FACTS:*

(A) *As to Count Three:* On or about April 25, 1985, Dr. Florez made deposits in the aggregate of $11,000.00 in currency to accounts he controlled at the Park Bank by making two deposits, one in the amount of $4,350.00 and a second in the amount of $5,650.00 at the Seminole Branch of the Park Bank of Florida. (R5-77-10).

(B) *As to Count Four:* On or about April 29, 1985, Dr. Florez deposited $12,400 in currency to accounts he controlled at Park Bank of Florida by making a deposit of $5,250.00 in currency at the Indian Shores Branch of Park Bank and a second deposit of $7,150.00 in currency at the Seminole Branch of Park Bank. (R5-77-10).

(C) *As to Count Eight:* On or about October 29, 1985, Dr. Florez used $11,000.00 in currency to purchase a cashier's check in the amount of $6,000.00 at the South Pasadena Branch of the Home Federal Savings and Loan Association and utilized another $5,000.00 in United States currency to purchase a Cashier's check at the central office of the Home Federal Savings and Loan Association. (R5-77-10).

(D) *As to Count Ten:* On or about October 29, 1985, Dr. Florez deposited $5,520.00 in currency at the 62nd Avenue Branch of the Home Federal Savings and Loan and also deposited $5,525.00 in currency at the 38th Avenue Branch of the Home Federal Savings and Loan. Additionally, on that date Petitioner purchased a cashier's check in the amount of $5,500.00 in currency at the South Pasadena

Branch of the Home Federal Savings and Loan Association. (R5-77-10).

(E) *As to Count Twelve:* On or about November 1, 1985, Dr. Florez deposited $10,700.00 in currency into accounts he controlled at the Southeast Bank by depositing $6,000.00 in currency at the Oakhurst Branch of Southeast Bank and by making a second deposit of $4,700.00 in currency at the Seminole Branch of Southeast Bank. (R5-77-11).

As to all of the transactions set forth in this Statement of Facts, no Currency Transaction Reports (CTR's) were filed by any of the banks or branches thereof as to these deposits. (R5-77-12).

REASONS FOR GRANTING THE WRIT

WHETHER THE COURT OF APPEALS ERRED IN FAILING TO REVERSE THE TRIAL COURT'S ORDER DENYING THE PETITIONER'S MOTION TO DISMISS FIRST SUPERSEDING INDICTMENT WHICH ASSERTED THAT STRUCTURING OF CASH DEPOSITS BY A BANK CUSTOMER DID NOT CREATE A PROSECUTABLE OFFENSE UNDER 18 U.S.C. SECTIONS 1001 AND 2(b).

In affirming the trial court's Order denying Petitioner's Motion to Dismiss First Superseding Indictment, the Court of Appeals cited its earlier decisions in *United States v. Tobon-Builes,* 706 F.2d 1092 (11th Cir. 1983) and *United States v. Giancola, 783 F.2d 1549 F.2d 1549 (11th Cir. 1986) cert. denied,* _____U.S._____, 107 S.Ct. 669 (1986). These decisions of the Eleventh Circuit Court of Appeals are in direct conflict with the decisions of the First, Seventh, Eighth and Ninth Circuit Courts of Appeal, *United States v. Anzalone,* 766 F.2d 676 (1st Cir. 1985); *United States v. Gimbel,* _____,F.2d_____ No. 86-1808 (7th Cir. 8/6/87); *United States v. Larson,* 796 F.2d 244 (8th Cir. 1986); *United States v. Barbel,* 780 F.2d 758 (9th Cir. 1986); *United States vs. Espriella,* 781 F.2d 1432 (9th Cir. 1986); *United States vs. Reinis,* 794 F.2d 506, (9th Cir. 1986); *United States v. Murphy,* 809 F.2d 1427 (9th Cir. 1987).

The conflict between and among the Courts of Appeal is dramatically apparent when it is considered that the First, Second, Fourth, Fifth, and Tenth Circuits have rendered decisions that are consistent with the positions taken by the Eleventh Circuit in *Tobon-Builes,* and *Giancola,* supra. See *United States v. Bank of New England,* _____F.2d _____ No. 86-1334 (1st Cir. 6/10/87); *United States v. Heyman,* 794 F.2d 788 (2d Cir. 1986) cert. denied 107 S.Ct. 585 (1986); *United States v. Richeson,* 825 F.2d 17 (4th Cir.

1987); *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979); *United States v. Cook*, 745 F.2d 1311 (10th Cir. 1984).

The Court should grant this Writ in order to resolve the dispute between the Circuits. The failure of this Court to issue the Writ will result not only in continued confusion over the law and the unusual criticism by one Circuit of another, but also in the imposition of unconstitutionally disparate treatment of individuals or entities prosecuted in different circuits for identical conduct.

The conflict between and among the various Circuit Courts of Appeal has been recognized in each of the cases cited above. The position taken by the Eleventh Circuit is often called the "form-over-substance" approach. This approach, adopted by some circuits and rejected by others, has caused great uncertainty in the application of the currency reporting requirements as they existed prior to the enactment of the Money Laundering Control Act of 1986, specifically 31 U.S.C. Section 5324.

By this approach, the First, Fifth and Eleventh Circuits have held that the Currency Transactions Reporting Act of 1970, 31 U.S.C. Sections 5311-22 (1982) imposed a duty upon banks to report structured transactions. The Seventh, Eighth and Ninth Circuits, however, have held that banks have no duty to report structured transactions and that the transactions are not "material facts" within the meaning of 18 U.S.C. Section 1001.

The resulting confusion and the differing treatment of and interpretations of the currency reporting laws and regulations by the circuits has led to Constitutionally unacceptable results. As a consequence of this conflict, the conduct

attributed to Dr. Florez in the Superseding Indictment has been determined to be non-criminal in some circuits and criminal in others.

In *Larson*, supra, the defendant was charged with violations of 18 U.S.C. §1001 and §2. He was convicted and on appeal argued that those convictions violated his due process rights because he had no fair warning that his conduct was illegal. The facts were, as here, undisputed. On September 17, 1982, Larson purchased with currency ten cashier's checks or money orders in five separate transactions, for a total of $44,500.00. Each transaction involved an amount slightly less than $10,000.00. The transactions occurred at four different locations at the F & M Marquette National Bank and the National City Bank. On November 30, 1982, Larson purchased twelve cashier's checks or money orders in six separate transactions, for a total of $53,300.00. Again, each transaction was slightly less than $10,000.00. Three transactions occurred at the F & M Marquette Bank, two transactions occurred at branches of the National City Bank, and one transaction occurred at the Western State Bank. Larson used false remitter names when obtaining the checks and money orders. On those occasions, however, when he was confronted by bank officials and questioned about this activities he gave his correct name and address. 796 F.2d 244, 245-46.

The Eighth Circuit, under the above facts, after noting the split between the First and Ninth Circuits and the Fifth, Tenth and Eleventh Circuits, went on to follow the reasoning of the First and Ninth Circuits stating:

> "since criminal laws are strictly contrued and any ambiguity is to be resolved in favor of lenity, *United States v. Emmons*, 410 U.S. 396, 411, 93 S.Ct. 1007, 1015, 35 L.Ed.2d 379 (9173), we hold that Larson

> cannot be guilty of concealing material facts. See *Anzalone,* 766 F.2d at 683 (in order to be guilty of concealing facts there must be a duty to disclose the facts); *United States v. Irwin,* 654 F.2d 671, 678 *)10th Cir. 1981) (there must be a duty to disclose facts) *cert. denied*, 455 U.S. 1016, 102 S.Ct. 1709, 72 L.Ed.2d 133 (1982). Since the Reporting Act imposed no duty on Larson to disclose his conduct to the banks, we hold that Larson was not guilty of concealing information from the Government. His due process rights were violated when criminal sanctions were imposed against him because he had no fair warning that his conduct was illegal."

In *Gimbel,* supra, the defendant, a lawyer, structured a transaction by having his bank issue eleven cashier's check for $9,900.00 each rather than making a lump-sum withdraw. The indictment alleged in part that Gimbel had violated 18 U.S.C. §1001 and §2 (b) by causing the bank to fail to disclose a material fact to the Government. The Seventh Circuit held that the fact that Gimbel, by structuring these withdrawals, caused his bank to fail to disclose his structured transactions did not constitute a crime. In so holding, the Seventh Circuit expressly rejected the Eleventh Circuit's *Tobon-Builes,* "form over substance" approach.

Thus, in either the Seventh or Eighth Circuits, as well as the Ninth Circuit, Dr. Florez's conduct would not have been illegal. Because Dr. Florez happened to reside in the Middle District of Florida and chose to conduct his banking affairs within the confines of the Eleventh Circuit, as alleged, he was sentenced to a ten year prison sentence. Such an irrational result, dependent as it is solely upon the geographical locale in which one conducts his banking affairs begs a definitive ruling by this Court.

CONCLUSION

For the foregoing reasons the Court should issue the Writ of Certiorari and resolve the split of opinion among and between the numerous Circuit Court of Appeals on the issues raised herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the fore going has been furnished by U.S. Mail to the United States Attorney, 500 Zack Street, Room 408, Tampa, FL 33602 and Sara Criscitelli, Esquire, Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 2004, on the 12th day of November, 1987.

FRANK LOUDERBACK, Esquire

TOM McCOUN, Esquire

APPENDIX A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-3021

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAIME FLOREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(September 16, 1987)

Before HILL, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

The only issue that would otherwise warrant discussion in this case is controlled by United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983), and United States v. Giancola, 783 F.2d 1549 (11th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 669 (1986). Therefore, the case is

AFFIRMED.

BEST AVAILA

APPENDIX B

BLE COPY

18 U.S.C. § provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its comission, is punishable as principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §1001 (1982) provides:

§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully, falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious of fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

31 U.S.C. §5313 (a) (1982) provices:

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency, (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

The regulation promulgated under this statute, 31 C.F.R. §103.22 (1982), provided that:

§103.22 Reports of currency transactions.

(a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

This regulation was amended in 1984; it now provides that:

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency of other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

31 C.F.R. §103.22(a) (1984).